

# SKIERMONT DERBY

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MEMO ENDORSED

March 13, 2020

3/16/20

**VIA ECF**

Hon. Colleen McMahon, U.S.D.J.  
United States District Court  
Southern District of New York  
Daniel Patrick Moynihan U.S. Courthouse  
500 Pearl Street  
New York, NY 10007-1312

Having heard from the parties, the Court  
Adjourns the bench trial currently scheduled for  
March 24, and sets the following new schedule:  
May 26, 27, 28 and June 2, 3, 4.

*Colleen McMahon*

**Re: *Ferring B.V., et al v. Serenity Pharm., LLC et al., C.A. 17-9922-CM (S.D.N.Y.)***

Dear Judge McMahon,

This firm represents Counterclaimants Serenity Pharmaceuticals, LLC and Reprise Biopharmaceutics, LLC (collectively, "Counterclaimants") in the above-referenced matter. We write, jointly with counsel for Plaintiffs Ferring Pharmaceuticals Inc., Ferring B.V., and Ferring International Center S.A. (collectively, "Ferring"), to address issues raised during the March 12, 2020 pretrial conference and to provide several dates to the Court that both parties are available to reschedule the trial in this matter such that it would be complete well in advance of the end of summer law clerk turnover.

Although neither parties' witnesses are available March 24-26, the parties' availabilities for trial are as follows. Counterclaimants are available the weeks of May 25, June 1, June 8, June 15, June 22, and June 29. Ferring is available the weeks of April 27, May 11, May 18, May 25, June 1, June 15, June 22, and June 29. The parties respectfully request that the Court reschedule trial for a period of six days when both parties are available at its earliest convenience.

Counterclaimants' witnesses, including Dr. Fein, are not available to testify March 24-26. Counterclaimants were planning to call Dr. Mayersohn and Dr. Murray on March 24 and March 25 and neither is available on those days due to the COVID-19 pandemic. The Court is aware of Dr. Mayersohn's issue as discussed in Court yesterday. Dr. Murray is a practicing physician in a hospital in Albany and he does not believe he should be traveling outside of his area during the outbreak because of the likelihood of transmission. Counterclaimants planned to call Dr. Velturo on March 30 and he was not scheduled to be in NYC on March 23 or 24, but in any event given that Dr. Velturo is approaching 60 years old he is likewise concerned about the risks of both traveling and staying in New York when NYC's infection rate is certain to be even higher the week of March 23 than it is today given the community transmission that has been observed in NYC.

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With respect to Dr. Fein, he believes that given his age that it is important that he follow the CDC's instructions for his at-risk age group to stay at home during the state of emergency that has been declared for NYC.

Much has changed even in the 29 hours since the parties were in Court yesterday. For instance, NYC has now declared a state of emergency, Broadway shows have all closed, jury trials have been cancelled, the Federal Circuit and USPTO have changed all arguments to telephonic, all professional sporting events have been cancelled, schools throughout the country have closed. In light of these facts, not to mention today's declaration of a national emergency, Counterclaimants' witnesses do not feel comfortable putting themselves and potentially others (in case they have already been infected and are in incubation periods) at risk by traveling into NYC for trial preparation and testimony the week of March 23, where they may end up being quarantined in their hotels, or worse. In light of the circumstances and the need for social distancing that has caused much of the U.S. to shut down in the last 24 hours, Counterclaimants understand these witnesses' concerns (especially in light of their age and/or status as practicing physicians who are very much needed at this time) and feel the need to respect such concerns under these unprecedented circumstances.

Ferring was and is prepared to proceed with the trial on March 24, 25, and 26 with opening statements and the cross-examination of Counterclaimants' witnesses. Ferring believes that the Court has instituted adequate safeguards to ensure the protection of counsel and Counterclaimants' witnesses, and Ferring would be open to additional accommodations that might further minimize the risk to Counterclaimants' witnesses (such as the presentation of those witnesses at times that would eliminate exposure to possible crowds). Ferring also notes that specifically with respect to Dr. Fein, his residence is close to the city (approximately 50 miles away) and that travel arrangements directly to and from the courthouse from his residence surely could be arranged. Even allowing for just opening statements and the testimony of Dr. Fein, starting the trial as scheduled on March 24 would allow the parties to resolve the remainder of issues to be tried in this case in a single week (as opposed to being spread out over six days) at a later date, if necessary. With respect to the availability of Ferring's witnesses on March 24-26, as noted during the pretrial conference, four of Ferring's witnesses are from Europe and thus cannot attend trial in March. As for Ferring's two U.S.-based witnesses, both were scheduled to testify during the second week of trial, and due to prior commitments, neither are available to testify March 24-26. Finally, Ferring notes that Counterclaimants have not provided any availability until the last week of May. Although Ferring has provided availability in that timeframe as well, Ferring hopes to resolve this matter as soon as possible, and has provided several weeks of availability from the end of April through May in hopes of being worked into the Court's schedule at the earliest possible time after the travel ban from Europe is lifted.

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Respectfully submitted,

s/ Paul J. Skiermont  
Paul J. Skiermont  
*Counsel for Counterclaimants*

s/ William P. Deni, Jr.  
William P. Deni, Jr.  
*Counsel for Ferring*